Supreme Court, U.S.
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No. 99-1771

IN THE

Supreme Court of the United States

ROBERT KAHRE,

Petitioner,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

USF&G is a wholly-owned subsidiary of St. Paul Fire and Marine Insurance Company, which is not publicly traded. The parent corporation of St. Paul Fire and Marine Insurance Company is The St. Paul Companies, Inc., which is publicly traded. No other publicly held company own's 10% or more of the stock St. Paul Fire and Marine Insurance Company.

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REASONS FOR DENYING THE WRIT

Petitioner Kahre presents six issues for review, none of which is so legally important as to warrant review by this Court. United States Fidelity & Guaranty Company ("USF&G") requests the Court deny Kahre's petition for these three reasons:

1. ***The motion to dismiss was decided on well-established Nevada law.*** Kahre seeks review of the ruling on his motion to dismiss, in which Kahre argued USF&G has no standing to file suit in Nevada state and federal courts because it never filed a certificate of corporate existence with the Nevada Secretary of State. Since 1941, Nevada has interpreted its own statutes as exempting foreign insurance companies from this requirement. An insurance company may file suit in Nevada so long as it has a "certificate of authority," which USF&G has had since 1903. As this issue triggers no federal constitutional issue, it appears unnecessary for this Court to become involved to review this longstanding state rule.

2. ***Relief from Default Judgment, Recusal, and Article III.*** Three of Kahre's issues relate to federal procedure. However, the lower courts' rulings were based on principles of law that are uniform throughout the federal circuits and the issues do not trigger federal constitutional concerns. Thus, these issues are not so crucial as to warrant Supreme Court review.

3. ***Two substantive issues were not properly before the court of appeals.*** In the remaining two issues, Kahre challenges the merits of USF&G's complaint. However, the district court entered a default judgment against Kahre based

on his failure to answer that complaint. Thus, the court never reached the complaint's merits; the merits were presumed true upon entry of the default. Thus, these substantive issues were never before the court of appeals and need not be considered by this Court.

PERTINENT FACTUAL BACKGROUND

This case was originally filed by USF&G because of a dispute with Robert Kahre over the payment of premiums for six insurance policies Kahre obtained from USF&G. These policies insured two businesses that Kahre owned and/or operated.

The policy premiums were based on a percentage of the annual payrolls for the two businesses. At the beginning of the policy period, Kahre would estimate the businesses' payrolls for the upcoming year and pay a premium based on that estimate. At the end of the policy period, Kahre would report the actual payrolls for the previous year and the premiums would be adjusted accordingly. (CR#31, ER 78 ¶ 4.)

USF&G eventually discovered that Kahre pays the employees of both companies with specially minted silver coins, rather than in standard U.S. currency. Kahre reported his payrolls to USF&G as if one coin equaled $1. Thus, if Kahre paid a total payroll of 60,000 coins in one year, he would report to USF&G that the payroll was $60,000. A dispute arose because each of the silver coins was comprised of one ounce of silver. Because the official exchange during the applicable period averaged about $5 per ounce, the payroll for these business was actually five times greater than Kahre reported, and his premiums should thus have been five times greater as well. (CR#31; ER 2-3 ¶¶ 5, 9; ER 72 ¶ 3; ER 78 ¶ 7; ER 79 ¶ 8.)

Upon discovering this, USF&G conducted an audit of Kahre's businesses, as allowed by the terms of the insurance policies. USF&G then determined the appropriate premiums and billed Kahre for the outstanding amounts. Kahre never disputed he owed the additional premium amounts, but he never paid them either. (CR#31, ER 79 ¶ 8.) So USF&G filed a complaint in the U.S. District Court for the District of Nevada, alleging breach of contract.

In response to this complaint, Kahre filed a Rule 12(b) motion to dismiss, claiming USF&G has no standing to file lawsuits in Nevada because it never filed a certificate of corporate existence with the Secretary of State. (CR#3, ER 6-11.) The district court denied this motion based on a longstanding ruling of the Nevada Attorney General that Nevada law does not require foreign insurance companies to file such certificates. (CR#7, ER 22-23.)

Kahre was eventually sanctioned $350 for filing a frivolous motion for reconsideration on this issue. (CR#12, ER 39-40.) He then filed a pleading called a "Writ of Praecipe Order to Show Cause in the Original in the Alternative" (CR#13), which apparently sought relief from the order for sanctions, and a "Petition for Criminal Prosecution" (CR#21) against the U.S. Attorney who sought to strike the "Writ of Praecipe."

Despite this procedural posturing, Kahre never answered the complaint. After obtaining a default, USF&G applied for a default judgment against Kahre. (CR#31, ER 61-80.) USF&G also filed a proof of service indicating it mailed a copy of the application to Kahre. (CR#31, Supplemental ER 1-2.) Kahre did not oppose the application, and the district court entered judgment in the amount of $75,759.52. (CR#35, ER 83; CR#36, ER 84.)

Kahre then moved to set aside this judgment under FRCP 60(b), claiming he was never served with the application. (CR#37.) The district court denied the motion because, irrespective of whether he actually received the application, Kahre never explained why he failed to answer the complaint in the first place. (CR#40, ER123-124.)

Kahre filed a notice of appeal to the Ninth Circuit, which eventually affirmed the default judgment. (*See* Memorandum of Decision attached to Kahre's petition.)

LEGAL DISCUSSION

I.

THE NINTH CIRCUIT'S RULING ON THE MOTION TO DISMISS WAS BASED ON NEVADA'S LONGSTANDING INTERPRETATION OF ITS OWN STATUTE, AND DOES NOT IMPLICATE FEDERAL CONSTITUTIONAL CONCERNS.

The first issue Kahre presents in his petition is whether the Ninth Circuit properly affirmed the district court ruling denying his motion to dismiss USF&G's complaint. This ruling was based on the longstanding interpretation of the pertinent Nevada statute by the Nevada Attorney General.

Nevada Revised Statute ("NRS") 80.010 requires that corporations organized under the laws of another state file a certificate of corporate existence with the Nevada secretary of state before doing business in Nevada. Kahre claims USF&G — a Maryland corporation — lacks standing to bring this lawsuit because it filed no such certificate.

However, Nevada law regulates insurance companies under NRS 680A, *et seq.* This Chapter allows an insurance company to conduct business in Nevada if it obtains a "certificate of authority" from the State's insurance commissioner. NRS 680A.060(1). Further, insurance companies possessing such a certificate have authority to institute lawsuits. NRS 680A.070(3).

It is undisputed USF&G has held a valid "certificate of authority" since 1903. (CR#4, ER 21.)

In his petition, Kahre argues the "certificate authority" is required ***in addition*** to the requirement of NRS 80.010 to register with the secretary of state. But that argument runs contrary to the opinion of the Nevada Attorney General, which interpreted NRS 680A to mean a foreign insurance company need not comply with NRS 80.010:

> Following the opinion of a former Attorney General, it is held that foreign insurance companies are not now required to file their Articles of Incorporation in the office of the Secretary of State.

Nevada Attorney General's Opinion B-61, dated June 26, 1941. (CR#4, ER 18.)

This interpretation has been in place for almost 60 years, and in that time, neither the Nevada Legislature nor the Nevada Supreme Court have seen fit to overrule that interpretation and expressly require compliance with NRS 80.010 in addition to obtaining a "certificate of authority."

This is an issue that the State of Nevada is competent to address on its own. If it is appropriate for foreign insurance companies to register with the secretary of state in addition to obtaining a certificate of authority, the State Legislature or Supreme Court may act accordingly. The fact that the State has let the Attorney General's Opinion stand for almost 60 years is a strong indicator that the Opinion is an accurate interpretation of these two statutory schemes. If these Nevada statutes — or Nevada's interpretation of those statutes — related to some provision of the United States Constitution, Supreme Court intervention could be appropriate. But this issue triggers no federal constitutional concern and this simply is not an issue that requires the attention of the United States Supreme Court.

II.

THE RULINGS ON THE DENIAL OF RELIEF FROM DEFAULT, THE RECUSAL ISSUE, AND THE ARTICLE III ISSUE ARE CONSISTENT WITH THE UNIFORM LAW OF THE VARIOUS CIRCUIT COURTS AND CASE LAW FROM THIS COURT.

Kahre's petition raises three issues governed by federal law:

1. Whether the district court abused its discretion in denying Kahre's Rule 60(b) motion for relief from default judgment, based on Kahre's failure to answer the complaint;

2. Whether the district court abused its discretion in denying Kahre's petition for the recusal of District Judge George where the claimed bias arose from a judicial source; and

3. Whether a retired District Judge can perform those functions authorized by Article III of the U.S. Constitution.

None of these issues require Supreme Court review because the case law among the various circuit courts is consistent and well-reasoned, and these issues present no important constitutional questions.

A. Federal case law uniformly allows a court to deny a request to set aside a default judgment where the defendant fails to adequately explain why no answer was ever filed.

Kahre claims he was never served with the application for default judgment. USF&G offers its proof of service as evidence that Kahre ***was*** served with the application. Even assuming, *arguendo*, that Kahre was not served, the lower courts' rulings are nonetheless appropriate.

Ordinarily, the failure to serve such an application, where required, gives rise to a basis for setting aside a default judgment. *Wilson v. Moore & Associates, Inc.*, 564 F.2d 366, 369 (9th Cir. 1977). However, a district court may properly refuse to set aside a default judgment where the defendant unjustifiably fails to answer the complaint in the first place. *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1391-1392 (9th Cir. 1989). That rule is consistent throughout the various federal circuits. *See, e.g., Zuelzke Tool & Engineering Co., Inc. v. Anderson Die Casting, Inc.*, 925 F.2d 226, 229 (7th Cir. 1991). Thus, there is no conflict of law for this Court to resolve.

Further, this issue raises no constitutional concerns. Although Kahre tries to frame this as a due process issue, claiming he has a right to a jury trial, it is clearly not. In refusing to answer the complaint, he waived his right to a hearing on USF&G's claims.

Kahre also claims he was prevented from answering the complaint by the district court's order prohibiting further filings without court permission. While the district court imposed this restriction after Kahre filed his "Writ of Praecipe" and "Writ of Prosecution," the court by no means prevented Kahre from answering the complaint. Kahre could have sought permission to file an answer, and the district court would undoubtedly have granted that request. Interestingly, Kahre sought permission to file a petition for the recusal of the district judge (*see* CR#29), so he evidently knew he could still seek and obtain permission to file pleadings. But he never requested permission to file an answer. It is clear he chose willingly not to file an answer, and Supreme Court review appears unnecessary on so basic an issue.

B. Judge George's decision not to recuse himself was consistent with this Court's rulings that recusal is required only where the alleged bias stems from a non-judicial source.

The district judge assigned to this case was Judge Lloyd D. George III. Kahre sought leave to file a petition for the recusal of Judge George, claiming the Judge was biased against Kahre. This bias allegation stemmed solely from the fact that Judge George had made several findings adverse to Kahre in another lawsuit in which Kahre was a party. Therefore, Judge George would not allow the petition to be filed (CR#29), and the Ninth Circuit affirmed.

Recusal is required only where the district judge's alleged bias stems from an extrajudicial source. *United States v. Silba*, 624 F.2d 868, 868 (9th Cir. 1980). That rule is supported by this Court's ruling in *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147 (1994), where the Court stated that a judge's rulings in judicial proceedings generally do not give rise to a basis for recusal:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id., 510 U.S. at 555. Kahre failed to lay an adequate foundation demonstrating that the allege bias towards Kahre stemmed from an extrajudicial source, and Kahre presents no such evidence in his petition to this Court. Thus, there is no need for Supreme Court review on this issue.

C. The orders from which Kahre appeals were properly issued by an Article III judge.

Kahre claims Judge George cannot properly perform functions under Article III of the U.S. Constitution because he is a retired district court judge. While Judge George is indeed retired, there is no authority for Kahre's argument.

"Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake." 28 U.S.C. § 294(c).

Nowhere does this statute provide that a retired district judge cannot perform the functions of an Article III judge. Such an interpretation is contrary to a plain reading of the statute's language. If Congress had intended to limit the scope of a retired district judge's authority to non-Article III functions, it would have so indicated in the language of the statute.

Further, the concept of a retired district judge performing Article III functions is constitutionally sound. Upon appointment, a district judge is authorized to act under Article III. Retirement alone does not diminish a district judge's capabilities or qualifications to perform the Article III functions he has already been constitutionally authorized to perform.

Thus, Kahre's argument that Judge George is not a proper Article III judge is without merit and does not require Supreme Court review.

Kahre also argues that Judges George and McKibben (the district judge assigned to this case before Judge George) are not Article III judges because of a "diminution in compensation." This argument is simply incomprehensible and lacks any merit.

III.

KAHRE'S ARGUMENTS AS TO THE VALIDITY OF THE INSURANCE "CONTRACT" AND THE METHOD OF PAYMENT IN COINS GO TO THE MERITS OF USF&G'S COMPLAINT, WHICH, BECAUSE OF THE DEFAULT JUDGMENT, ARE NOT PROPER ISSUES FOR REVIEW.

In his petition, Kahre presents two issues that go to the merits of USF&G's complaint: (1) whether USF&G had a valid contract (*i.e.* insurance policy) with Kahre;[1] and (2) whether there was, in fact, insufficient payment of the policy premiums based on Kahre's method of payment in silver coins.

Kahre never answered USF&G's complaint and he was thus defaulted. Upon entry of the default, the allegations in USF&G's complaint were presumed to be true and Kahre lost the opportunity to dispute those allegations. In other words, he gave up his chance to dispute that there was a valid contract; he gave up his chance to dispute that he underpaid his policy premiums by under-valuing his silver coins in reporting his payroll. Only if a court sets aside the default judgment are the merits of the complaint open for dispute. Because of Kahre's refusal to answer the complaint, the Ninth Circuit was not obligated to consider the merits of Kahre's defenses to the complaint. *See Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987). Therefore, there is no need for this Court to consider these issues.

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1. Kahre couches his argument about the validity of the contract in terms of standing to file suit. Whether a contract is valid, however, is an essential element of a breach of contract claim. Thus, the argument relates not to standing, but to the substance of the complaint.

CONCLUSION

This case simply is not appropriate for Supreme Court review. First, Kahre presents one issue relating to Nevada substantive law: whether Nevada requires a foreign insurance company to register with the Nevada secretary of state when it already has a "certificate of authority" from the Nevada insurance commissioner. The lower courts' rulings on this issue are consistent with the interpretation of Nevada law that has been in place for almost 60 years.

Second, Kahre presents three issues that involve federal law: the motion to set aside the default judgment; the request for District Judge George's recusal; and Judge George's status as an Article III judge. The lower courts decided these issues based on valid case law from this Court, and on case law that is uniform and consistent throughout the various appellate circuits.

Third, Kahre presents two issues challenging the merits of USF&G's complaint. He lost the chance to make those arguments, though, when he failed to answer the complaint when required.

For these reasons, USF&G respectfully requests the Court deny Kahre's petition for writ of certiorari.

Respectfully submitted,

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